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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
 )  
Procedures for Reviewing )  
Requests for Relief From State )  
and Local Regulations Pursuant )  
to Section 332(c) (7) (B) (v) of )  
the Communications Act of 1934 )

97-192  
WT Docket No. 97 - 197

To: The Commission

**COMMENTS OF  
THE CAPE COD COMMISSION**

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October 24, 1997

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**COMMENTS OF  
THE CAPE COD COMMISSION**

The Cape Cod Commission ("CCC") submits these comments in response to the Notice of Proposed Rulemaking, released August 25, 1997, in the above-captioned proceeding ("NPRM").

The CCC was created pursuant to the Cape Cod Commission Act, Chapter 716 of the Acts of 1989, as amended. The CCC has an address and a principal place of business at 3225 Main Street, Barnstable, Massachusetts. The CCC is a regional land use planning and regulatory agency. The CCC provides planning and technical assistance to the fifteen towns which comprise Barnstable County, Massachusetts. The CCC is also the Regional Planning Agency for Barnstable County. CCC membership includes one appointed representative from each of the fifteen towns of Barnstable County and four appointed at-large members. Because

many of the proposals in the NPRM, if adopted, would directly infringe upon the authority of municipalities to exercise police powers concerning public safety, land use and zoning that have been traditionally and properly entrusted to them, the CCC raises the following concerns on behalf of its member towns.

## **INTRODUCTION**

The NPRM seeks comments in two areas: (1) procedures which the Federal Communications Commission ("FCC") might follow in acting on petitions for relief under 47 U.S.C. § 332(c) (7) (B) (iv) - (v) from state or local wireless facility siting decisions based on environmental effects of radiofrequency ("RF") emissions; and (2) proposed guidelines limiting the type of information a local government may request to establish compliance with FCC RF standards, as well as presumptions concerning compliance with those standards.

The CCC believes that aspects of the NPRM concerning the scope of FCC authority under Section 332(c) (7) (B) (iv) - (v) are contrary to the statute Congressional intent. In addition, the NPRM proposes rules which will result in unsound public policy. The proposed rules would involve the FCC in factual inquiries into the motives behind the decisions of local legislative bodies. Courts, and not the FCC, are the appropriate forum for resolving factual disputes concerning a local zoning decision. Indeed, courts are already doing so under the far broader authority provided under Section 332 (c) (7) (B) (v). If the FCC is to have a role in reviewing local decisions we suggest that such a role be confined to reviewing local decisions which on their face are based on RF emission concerns.

The NPRM proposes showings required for RF compliance and the creation of a presumption concerning the same. Compliance with RF emissions is a public safety matter and the public is entitled to express concerns about whether a wireless facility poses a risk to human health. The CCC believes that because this is a matter of public safety, the wireless provider should be required to show that its facilities comply with rules that the FCC has established to ensure protection of public safety.

1. **THE FCC LACKS THE LEGAL AUTHORITY TO PREEMPT LOCAL ZONING DECISIONS BASED "PARTIALLY" ON RF EMISSIONS.**

A. The Scope of the FCC's Jurisdiction under Section 332(c) (7) (B) (v) is Narrow and Non-exclusive.

Section 332(c) (7) (A) provides that, except as provided in Section 332 (c) (7), “nothing” limits or affects local zoning authority over decisions relating to the placement, construction or modification of personal wireless facilities.

Section 332(c) (7) (B) (v) gives courts jurisdiction over all disputes under Section 332 (c) (7) (B), including those relating to RF emissions. In addition, Section 332(c) (7) (B) (v) gives courts exclusive jurisdiction over all disputes under Section 332 (c) (7) (B) other than those based on RF emissions within the meaning of subparagraph (iv).

The FCC's jurisdiction is strictly limited to RF emission disputes falling within Section 332(c) (7) (B) (iv), and in these cases jurisdiction is shared with the courts pursuant to Section 332(c) (7) (B) (v).

B. The NPRM's Interpretation of the Terms “Final Action” and “Failure to Act” Must be Revised to be Consistent With Congressional Intent.

The NPRM's interpretation of the term “Final Action” requires revision. A local government's decision cannot be considered final until the local body responsible for such a final determination has had the opportunity to act on the matter. Thus, a decision made by a local zoning board, commission or official that is subject to internal administrative appeal to a local zoning board of appeals is not a final administrative action at the state or local government level. The Conference Report (at 209) clarifies that the only remedy a petitioner under Section 332(c) (7) (B) (v) does not have to exhaust is a “State court remedy”.

The NPRM's proposed interpretation of “failure to act” (at paragraph 138) also requires revision. Local courts are in a superior position to determine relevant local time frames for action on a particular application. FCC adoption of a time frame which is not consistent with existing local time frames for action could result in wireless providers receiving preferential treatment in processing of local development permit applications. Given that the FCC would have to share

jurisdiction over "failure to act" determinations with the courts, the FCC should defer to courts which are in a better position to determine appropriateness of local decision-making time frames.

C. The NPRM's Proposal To Preempt Local Decisions Based "Only Partially" on RF Emissions Should Not Be Adopted.

The NPRM's proposal would lead to grossly inefficient resolution of disputes. Such a rule would compel local governments and wireless providers to expend resources litigating disputes over the same local zoning decision simultaneously in two different fora, the courts and the FCC. In addition to requiring increased expenditures of public resources, such a rule carries the risk of obtaining inconsistent results,

In addition, "partial" preemption would serve no purpose where a local decision is based upon multiple factors. Even assuming that a local decision is based, in part, on RF emissions, the FCC could not preempt the result of the local zoning decision because the other grounds for denying the permit are beyond the FCC's limited jurisdiction to review and preempt. At most, the FCC could issue an advisory ruling that part of the rationale of the local zoning decision was inconsistent with subparagraph (iv). In order to avoid the needless waste of public resources, the FCC should adopt policies designed to encourage providers to go to court in the first instance.

II. The FCC's JURISDICTION UNDER SECTION 332(c) (7) (B) (iv) - (v) SHOULD BE LIMITED TO LOCAL DECISIONS WHICH ON THEIR FACE ARE BASED ON RF EMISSIONS AND WHEN THE FACILITIES AT ISSUE ARE IN COMPLIANCE WITH FCC RULES.

Congress provided industry with an appropriate remedy by providing a very specific court remedy for disputes. The FCC should exercise its limited authority under Section 332(c) (7) (B) (iv) - (v) by reviewing only local zoning decisions that are, on their face, based on RF emission. Broadening the FCC's role in disputes over local decision making would not respect the role of the courts as set forth in the enabling legislation. In the event a provider believes that a local decision is based on RF emissions even though the local decision fails to state such a basis,

courts have jurisdiction over RF disputes under subparagraph (iv). In addition, courts are in a better position to provide a determination based upon a factual dispute which occurred at the local level and which is within their usual jurisdiction.

### **III. THE BURDEN OF DEMONSTRATING COMPLIANCE WITH RF EMISSION STANDARDS SHOULD BE PLACED ON WIRELESS PROVIDERS.**

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The CCC supports the NPRM's tentative conclusion (at paragraph 142) that "it is reasonable for state and local governments to inquire as to whether a specific personal wireless service facility will comply with [FCC] RF emission guidelines."

#### **A. Local Governments Should Be Allowed to Require Providers to Demonstrate RF Compliance.**

Due to FCC's blanket licensing process for most wireless facilities, the FCC will not know the location or actual emissions of many, if not most, new non-categorically excluded wireless facilities. Because the FCC does not effectively audit or check provider compliance with RF requirements at the local level, the result is a compliance system based almost entirely on industry certification. In order to ensure compliance, local governments should be allowed to require providers to prove that the FCC's RF emission standards are met. We therefore urge the FCC to work with local governments to develop recommended RF compliance monitoring procedures that are fully responsive to the public's expressed concerns on RF safety issues.

#### **B. The Wireless Provider Should Carry the Burden of Demonstrating Compliance With RF Emission Rules in Proceedings Before the FCC.**

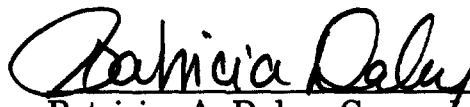
The NPRM proposal (at paragraph 151) to adopt a rebuttable presumption that facilities are in compliance with FCC rules in FCC relief proceedings under Section 332(c) (7) (B) (v) would abrogate FCC's responsibilities under the statute.

The burden should be on the provider to show that its facilities are in compliance with FCC RF requirements. We believe that this approach is mandated by the statute. Section 332(c) (7) (B) (iv) states that facilities must "comply with the Commission's regulations concerning such emissions."

### **CONCLUSION**

For the foregoing reasons, the CCC respectfully requests that the FCC consider modifying its proposed rulemaking to better respect the role of local decision makers in the wireless facility permitting process.

Respectfully Submitted:

A handwritten signature in cursive script, appearing to read "Patricia A. Daley", is written over a horizontal line.

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